DAVID LIM HONG KEE

v.

PERWIRA AFFIN BANK BHD

HIGH COURT SABAH & SARAWAK, TAWAU
LINTON ALBERT JC
[CASE NO: T(29) 249-1997]
27 OCTOBER 2003

BANKRUPTCY: *Notice - Setting aside - Amount in notice included interest one day beyond limitation period of 6 years - Whether notice bad in law - Limitation - Bankruptcy proceedings in Sabah - Limitation statute applicable - Whether Limitation Act 1953 - Whether Limitation Ordinance (Cap. 72) (Sabah) - Limitation Act 1953, s. 6(3) - Limitation Ordinance (Cap 72) (Sabah), ss. 2, 3, Item 97*

CIVIL PROCEDURE: *Res judicata - Scope and nature - Special circumstances - Application to set aside bankruptcy notice - New argument raised in light of recent decision of Federal Court - Whether constituting special circumstance - Whether not vitiated by res judicata*

On 13 June 1990, the respondent obtained a judgment against the appellant in the High Court in Malaya at Kuala Lumpur ('the judgment'). Thereupon the respondent initiated bankruptcy proceedings against the appellant but the petition was dismissed in 1995. On 28 November 1997, with leave from the High Court at Kuala Lumpur, the respondent issued a bankruptcy notice ('BN') against the appellant in the High Court of Sabah & Sarawak at Tawau, claiming for RM 9,664,457.64, including arrears of interest as at 13 June 1996. The appellant applied to set aside the BN ('encl. 15') but the application was dismissed on 29 June 1998. The appellant appealed, but pending that filed another application to set aside the BN ('encl. 50') on the new argument that the BN was bad in law since the six-year period, by virtue of s. 6(3) of the Limitation Act 1953 ('the Act'), expired after 12 June 1996 (*United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] CLJ JT (3) cited in support). Encl. 50 was also dismissed by the learned Senior Assistant Registrar ('SAR') and the appellant appealed.

Before the learned appellate judge, the respondent argued that the appellant, if at all, ought to have raised the issue of s. 6(3) via Encl. 15, and not through Encl. 50, as *res judicata* would have then applied. The appellant retorted that the vital significance of s. 6(3) was only known after the Federal Court had

delivered its judgment in *Ernest Cheong Yong Yin* case on 5 April 2002, and *res judicata*, therefore, could not, under such special circumstances, apply. It was further argued that the BN was also bad by virtue of item 97 of the Limitation Ordinance (Cap 72) (Sabah) ('the Ordinance'). The primary issues that arose were: (i) whether *res judicata*, the Act and the Ordinance applied to the circumstances of this case; (ii) whether the BN was bad in law and ought to be set aside.

Held:

[1] The vital significance of s. 6(3) of the Act was only known after the Federal Court judgment in *Ernest Cheong Yong Yin*. In the circumstances, this case comes under the category of special cases where the doctrine of *res judicata* does not apply. To hold otherwise would diminish the importance of the judicial pronouncements of the apex court. (p 80 e-g)

[2] Section 1(1) of the Act is very clear and unequivocal in that its territorial application is limited to West Malaysia only. Therefore, notwithstanding that the judgment upon which the BN was issued was obtained in the High Court in Malaya at Kuala Lumpur, or that the contract in respect of which judgment was obtained was concluded in West Malaysia, or that leave to execute the judgement was granted by the High Court at Kuala Lumpur, the Act could not be stretched so as to apply to bankruptcy proceedings commenced and instituted in the High Court in Sabah. Surely s. 6(3) has no application in Sabah which has its own separate statute to regulate limitation of suits, actions or other proceedings, namely the Limitation Ordinance (Cap 72). Thus, the Act has no application to the BN under encl 50 herein. (pp 80 g-h & 81 a-e)

[3] The doctrine of *res judicata* or issue estoppel does not have sufficient force to render the relevant provisions of the Ordinance irrelevant. It is inconceivable for the court, under any circumstances, to remain oblivious to the existence of any statute by refusing to apply its provisions. There is therefore no merit in the respondent's contention that the court was precluded from considering the relevant provisions of the Ordinance as the appellant could and should have raised the matter under encl 15. (p 81 e-h)

[4] The principle that if a suit is not covered by way of the specific articles prescribing a period of limitation, it must fall within the residuary article, and that the residuary article is applicable to every variety of suits not otherwise provided for, applies to Item 97 of the Ordinance. In the present

case, as the BN does not come within the specific items set out in the Schedule of the Ordinance, the residuary Item 97 of the Ordinance must therefore apply. It follows that the BN is bad in law and therefore invalid, because the amount stated in the BN includes interest one day beyond the limitation period of 6 years provided by Item 97 of the Ordinance. In the circumstances the decision of the SAR is set aside and substituted with an order allowing the appellant's application under encl. 50.
(pp 83 b-h & 84 a-c)

[Application allowed. Order accordingly.]

Case(s) referred to:
Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 SC ***(refd)***
Sarawak Securities Sdn Bhd v. William Leong Wai Ling & Ors [2002] 1 MLJ 294 ***(foll)***
United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC; [2002] CLJ JT(3) ***(refd)***
Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd & Anor [1975] AC 581 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(2)(ii),
Limitation Act 1953, ss. 1(1), 6(3)
Limitation Ordinance (Cap 72) (Sabah), s. 2

Limitation Act 1963 [Ind], art. 113

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 16, p 1019

For the appellant - Mary Lee; M/s Lee & Kong
For the respondent - Wilson Chang; M/s Wilson Chang & Partners

Reported by WA Sharif

JUDGMENT

Linton Albert JC:
On 15 October 2003 I allowed the appeal with costs. I shall now give the grounds.

This appeal has its origins from a judgment (the judgment) obtained by the respondent against the appellant in the High Court in Malaya at Kuala Lumpur more than a decade ago on 13 June 1990. From then on it took a long and tortuous course beginning with the bankruptcy proceedings commenced by the respondent in the same court where the judgment was obtained. The creditor's petition for a receiving and adjudicating order dated 23 November 1992 was

successfully resisted by the appellant. The creditor's petition was dismissed on 24 November 1995. The respondent appealed to the Court of Appeal but the appeal was withdrawn on 13 February 1998, as the respondent had meanwhile on 28 November 1997 issued a bankruptcy notice in the High Court in Sabah at Tawau against the appellant after obtaining leave of the High Court in Kuala Lumpur on 13 May 1997. The appellant sought to set aside the said bankruptcy notice (the BN) issued on 28 November 1997 by way of summons in chambers (encl. 15) dated 26 May 1998. This time the appellant was not so successful. It was dismissed on 29 June 1998. The appellant appealed to the Court of Appeal but before the appeal could be disposed of the respondent encountered another spanner in the works with yet another attempt by the appellant to set aside the BN by way of summons in chambers. (encl. 50) dated 12 August 2002. The Court of Appeal dismissed the appeal in respect of encl. 15 on 6 October 2002.

The appellant's application under encl. 50 was dismissed by the learned senior assistant registrar. Hence this appeal. The BN which the appellant seeks to set aside under encl. 50 states a claim for RM9,664,457.64 as at 13 June 1996 which includes arrears of interest. The judgment obtained by the respondent on 13 June 1990 was as follows:

1. di bawah pinjaman jangkamasa, jumlah sebanyak $3,092,501.00 dan faedah keatasnya dengan kadar 9% setahun daripada 1hb Julai 1984 sehingga tarikh penuh penyelesaian.

2. di bawah Kemudahan Overdraf jumlah sebanyak $2,500,035.77 dan faedah keatasnya dengan kadar 9% setahun daripada 29hb Jun 1984 sehingga tarikh penuh penyelesaian, dan kos berjumlah $350.00.

Mary Lee, learned counsel for the appellant argued that since the judgment was obtained in West Malaysia, s. 6(3) of the Limitation Act 1953 (the Act) applies. The six years period expired after 12 June 1996, and the sum stated in the BN having included arrears of interest up to 13 June 1996, the BN must, therefore, on the authority of the landmark case of *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413; [2002] CLJ JT(3), be bad and ought to be set aside.

Unsurprisingly the respondent resisted the appellant's application. Learned counsel for the respondent, Wilson Chang contended that the appellant could and should have raised the issue of s. 6(3) of the Act in his attempt to set aside the BN under encl. 15 and for the appellant to raise the issue by taking out another application under encl. 50 would run counter to the doctrine of *res judicata*. Learned counsel for the respondent relied on the case of *Yat Tung*

Investment Co. Ltd. v. Dao Heng Bank Ltd & Another [1975] AC 581 and quoted a passage from the judgment of Lord Kilbrandon at p. 590 which is reproduced below:

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of *res judicata* is the judgment of Wigram VC. in *Henderson v. Henderson* [1843] 3 Hare 100, 115, where the judge says:
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> > ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Learned counsel for the appellant contended that the vital significance of s. 6(3) of the Act was only known after the Federal Court delivered its judgment in *United Malayan Banking Corporation Bhd. v. Ernest Cheong Yong Yin (supra)* on 5 April 2002 and must therefore come under the category of special cases where the doctrine of *res judicata* does not apply. I agree because it stands to reason that to hold otherwise would in effect diminish the importance of the judicial pronouncements of our apex court. I am acutely aware that the doctrine of *res judicata* is important to prevent an abuse of process but it is, in my opinion, more important that litigants must not be shut out simply because of its strict application and thereby rendering judgments of the apex court not available in previous proceedings totally irrelevant and consigned to oblivion.

It is argued on behalf of the appellant that s. 6(3)of the Act is applicable to the BN issued out of the High Court in Sabah at Tawau because the judgment upon which the BN was issued was obtained in the High Court in Malaya at Kuala Lumpur. In addition to that, the contract in respect of which judgment was obtained was also concluded in West Malaysia and leave to execute the judgment was granted by the High Court at Kuala Lumpur. Even taking all these factors into consideration, I do not see how the Act can be stretched so

as to extend its application to bankruptcy proceedings commenced and instituted in the High Court in Sabah. Section 1(1) of the Act is very clear and unequivocal in its wording limiting its territorial application to West Malaysia only. It states as follows:

> This Act shall apply to **West Malaysia only**. (emphasis added)

Surely, s. 6(3) of the Act has no application in Sabah which, like Sarawak, has its own separate statute to regulate limitation of suits actions or other proceedings in their respective territorial jurisdictions. In Sabah, the Limitation Ordinance (Cap 72) applies. By way of analogy, it may be useful to quote from a passage in the case of *Sarawak Securities Sdn Bhd v. William Leong Wai Ling & Ors* [2002] 1 MLJ 294 where at p. 297 Ian Chin, J had this to say:

> It is clear from that decision that the amendment should take effect from the date of the action because s. 31 of the SLA says so. Similarly, the decision in *Koay Chiew Leong (t/a Leong & Co) v. United Engineers (M) Bhd* [1999] 5 MLJ 390 was because a similar s. 31 of the Malaysian Limitation Act 1953 ('the Act') also says. Those statutes do not apply to Sarawak, which has its own Limitation Ordinance and which ordinance does not have a provision like s. 31 of the Act. Therefore, no assistance can be derived from those authorities when considering the position in Sarawak.

In the circumstances, I hold that the Act has no application to the BN under encl. 50, which brings me to the unenviable task of having to determine whether it is proper to now consider the contention of Mary Lee, learned counsel for the appellant, that the BN is also bad by virtue of Item 97 of the Limitation Ordinance (Cap 72) (the Ordinance). This issue emerges for the first time as a response to the arguments canvassed by Wilson Chang, counsel for the respondent that the Ordinance applies but Wilson Chang is somewhat ambivalent about it in that he also contends that the court is precluded from considering the relevant provisions of the Ordinance as it is clear that the appellant could and should have raised the matter under encl. 15 and there is no reason why the doctrine of *res judicata* should not be applied. With respect, I do not think that the doctrine of *res judicata* or issue estoppel has sufficient force to render the relevant provisions of the Ordinance irrelevant. In my view, it is inconceivable for the court, under any circumstances, and at any stage, of the proceedings to remain oblivious to the existence of any statute by refusing to apply its provisions. Support for this view can be found in the *Halsbury's Laws Of England,* 4th edn, vol. 16 at p. 1019 which states as follows:

> The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted to be invalid, or to give the court a jurisdiction which is denied to it by statute, or to oust the court's statutory jurisdiction under an enactment which precludes the parties contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers.

Similarly in *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174, Hashim Yeop Sani, CJ (Malaya) delivering the judgment of the Supreme Court says:

> On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions.

Having formed the view that the doctrine of *res judicata* or issue estoppel has no application, I shall now proceed to consider and determine whether the relevant provisions of the Ordinance are of any assistance to the appellant's contention that the BN is bad in law and must therefore be set aside, and in doing so, it is useful to set them out. The preamble of the Ordinance states that it is to regulate limitation of suits.

Section 2 defines suit as follows:

> 'suit' includes any action or other proceeding;

Section 3 is as follows:

> Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefor by the Schedule shall be dismissed:
>
> Provided that limitation has been set up as a defence.

There is no controversy as to whether the bankruptcy proceedings commenced by the appellant in the form of the BN come within the definition of s. 2 of the Ordinance which is undoubtedly all-embracing. Mary Lee and Wilson Chang the learned counsel for the appellant and the respondent respectively both agree that the BN does not come under any specific item set out in the schedule to the Ordinance. Learned counsel for the respondent therefore argues that sub-s. (2)(ii) of s. 3 of the Bankruptcy Act 1967 applies. It states that a bankruptcy notice:

> shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

With respect, the argument relating to the foregoing provision of the Bankruptcy Act 1967, is an entirely different proposition which has no application to the present appeal which concerns the appellant's contention that the BN ought to be set a side by virtue of the statutory provisions of the Ordinance. I agree with the contention of learned counsel for the appellant that it is simply because the BN does not come within the specific items set out in the schedule of the Ordinance that the residuary item of Item 97 of the Ordinance must therefore apply. It is as follows:

	Description of Suit	Period of Limitation	Time from which period begins to run
Item 97.	Suit for which no period of limitation is provided elsewhere in this Schedule	Six years	When, the right to sue accrues

It is noted that Item 97 of the Ordinance is, except for the difference in the period of limitation, almost identical to art. 113 of the Indian Limitation Act 1963 which is as follows:

Description of suit	Period of limitation	Time from which period begins to run
113. Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

This is what the learned authors of *Law of Limitation* (A casebook on the Limitation Act 1963) have to say on art. 113 at p. 829:

> Art. 113 is a residuary article and it applies not because of its own force but because there is no other article in the Limitation Act, to a particular case on hand: [1981] 2 An. WR 64.

> If a suit is not covered by way of the specific articles prescribing a period of limitation, it must fall within the residuary article. The purpose of the residuary article is to provide for cases which could not be covered by any other provision in the Limitation Act. The residuary article is applicable to every variety of suits not otherwise provided for: [1998] 2 Punj. LJ 635.

In my view, the foregoing principle applies with equal force to Item 97 of the Ordinance. That being so, I hold that the BN is bad in law and therefore invalid because the amount stated in the BN includes interest one day beyond the limitation period of six years provided by item 97 of the Ordinance (see *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin, Supra)*. In the circumstances the decision of the learned senior assistant registrar is set aside and substituted with an order allowing the appellant's application under encl. 50. Appeal allowed with costs.